APPENDIX A

386 Mass. 385

Commonwealth v. Podgurski.

COMMONWEATLH V. RONALD PODGURSKI

(and three companion cases[1])

Norfolk. February 3, 1982-June 2, 1982

Present: Hennessey, C.J.,
Wilkins, Liacos, Abrams,
& O'Connor, JJ.

Search and Seizure, Automobile, Expectation of privacy, Standing to object. Constitutional Law, Search and seizure.

Defendants in a criminal case had a legitimate expectation of privacy in the windowless rear interior of a cargo van, parked with its sliding door ajar in a lot to which the public had access, so that a police officer's initial observation of illegal activity, which occurred only after he walked up to the van and "stuck [his] head inside," and his subsequent seizure of contraband, constituted a search and

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1/ One is against Ronald Podgurski; two are against Edward J. Collins, III.

seizure within the scope of the Fourth Amendment. [ ]

A police officer's action in entering the windowless rear interior of a parked cargo van was not, in the circumstances, supported by probable cause; nor did it meet the constitutional standard for a threshold inquiry. [ ]

Lack of property interest in a cargo van which had been subjected to a police officer's unlawful search did not deprive a passenger in the van of standing to object to the search, where his situation was identical to that of the ower of the van. [ ]

INDICTMENTS found and returned in the Superior Court Department on September 29, 1980.

A pretrial motion to suppress evidence was heard by Dwyer, J.

An application for an interlocutory appeal was allowed by Liacos, J., in the Supreme Judicial Court for the county of Suffolk, and transferred by him to the Appeals Court.

The Supreme Judicial Court ordered direct review on its own initiative.

Peter M. McElroy, Assistant District Attorney (Charles J. Hely, Assistant District Attorney, with him) for the Commonwealth.

Commonwealth v. Podgurski.

Richard C. Driscoll, Jr., for Edward J. Collins, III.

Edward G. Butler for Ronald Podgurski.

Liacos, J. We are asked to determine in this interlocutory appeal by the Commonwealth, whether the windowless rear interior of a cargo van, parked in a lot accessible to the public, is an area whose occupants may entertain a legitimate expectation of privacy. The judge ruled that an intrusion into such an area, made without probable cause and without either a warrant or exigent circumstances, was violative of both the Fourth Amendment to the United States Constitution and art. 14 of the Declaration of Rights of the Massachusetts Constitution. We affirm the motion judge's order suppressing the evidence. Our narrative draws liberally on the judge's undisputed findings, with only minor supplementation from the record.

On the afternoon of September 22, 1980, the manager of a clothing store in Canton telephoned the police in that town with a report of certain "suspicious activity" in a blue van parked in the lot at the rear of the

store.[2] The officer who took the call dispatched one Officer James Brown to the scene. Brown testified he was told to check "[t]wo men inside a van acting suspicious." Brown proceeded to the parking lot and observed the van.[3] He approached the van from the side. When he was within ten feet of it, he determined that the sliding cargo door on the passenger side was open approximately fifteen to eighteen inches, and that two people were in the rear of the van. From this vantage point he did not observe either contraband or criminal activity. Nevertheless he walked up to the van and, in his words, "stuck [his] head inside." Once partially inside the van, he observed the defendants, both of whom

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2/ The officer who took the call testified that the manager said the two men were "cutting up something they shouldn't have been cutting." The judge did not accept this version of the citizen's call.

3/ The judge made no findings on the point, but it appears from the record that the vehicle was a cargo-type van with windows in the driver and passenger doors, in addition to the front windshields.

he knew. Both men were apparently engaged in cutting and bagging portions of a brown substance, later shown to be hashish, contained in a clear plastic sandwich bag. Officer Brown seized this bag. At that point another officer arrived, and the two men were ordered from the van owned by the defendant Collins. The officers then reentered the van and seized other drugs and paraphernalia. The defendants were charged with possession, with intent to distributer, of a class C controlled substance (G.L. c. 94C, § 31), and with conspiracy to violate G.L. c. 94C, § 32.

Our initial task is to characterize properly Officer Brown's entry of the van. In arguing that the judge applied an erroneous legal standard by requiring probable cause to search, the Commonwealth urges on us the proposition that Officer Brown's entry was not a search but rather a "lawful threshold inquiry."[4/] See Adams v. Williams, 407 407 U.S. 143 (1972); Terry v. Ohio, 392 U.S. 1 (1968). Cf. G.L. c. 41, § 98; Commonwealth v. Bacon, Mass Adv. Sh.

4/ The record before us does not reveal whether this contention was made to the motion judge. The defendants, however, make no claim that the Commonwealth has waived this point.

(1980) 2223, 2224. Before reaching this issue, we must first determine whether the conduct of Officer Brown constituted a search in the Fourth Amendment sense. This question is answered in part by determining whether the police actions constituted an intrusion into an area where the defendants had a "legitimate expectation of privacy in the particular circumstances." Sullivan v. District Court of Hampshire, Mass. Adv. Sh. (1981) 2370, 2375-2376, and cases cited.5/ Unless such an interest has

5/ The expectation-of-privacy inquiry as to whether a search has occurred is preliminary to a determination whether applicable probable cause and warrant requirements have been followed. See Commonwealth v. Ortiz, 376 Mass. 349, 353 (1978); Rawlings v. Kentucky, 448 U.S. 98, 111-113 (1980) (Blackmun, J., concurring). The expectation-of-privacy analysis utilized with respect to the validity of a defendant's claim is also the mode through which the United States Supreme Court has chosen to analyze a defendant's "standing" to raise the Fourth Amendment claim. Rawlings v. Kentucky, supra at 106. See also United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978). See note 11, infra.

been invaded unlawfully by the police, no Fourth Amendment violation can be claimed. Id.

We must determine whether the defendants' expectation of privacy in the interior of a windowless van, parked with its sliding door ajar in broad daylight and in a lot to which the public has access, is one which society could recognize as reasonable. See Rakas v. Illinois, 439 U.S. 128, 143-144 n.12 (1978); Katz v United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The judge ruled this expectation to be reasonable, and we agree. In reachng this conclusion we are aware just how precisely the case turns on the manner in which the officer first observed the illegal activity in the van by standing in the parking lot, or at some other vantage point where he was legally entitled to be, and either looking through the two side windows or the windshield, or peering through the partially open door, this initial observation would not have intruded on any expectation of privacy which the defendants could reasonably have had in the circumstances. Such an initial observation, made without physical intrusion into the vehicle, would have been lawful and could provide probable cause for the issuance of a warrant or, exigent circumstances, for a warrantless

seizure. See Commonwealth v. Ortiz, 376 Mass. 349, 351-353 (1978); Commonwealth v. Baldwin, Mass. App. Ct. Adv. Sh. (1981) 354, 358-359; 1 W.R. LaFave, Search and Seizure § 2.2, at 242-243 (1978).

Here, however, the officer did not discover the illegal activity until after his warrantless intrusion into the interior of the van. We are aware that a motor vehicle is generally afforded a lesser degree of Fourth Amendment protection than is other property. See United States v. Chadwick, 433 U.S. 1, 12 (1977); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976); Carroll v. United States, 267 U.S. 132 (1925). We agree with the motion judge, however, that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, 403 U.S. 443, 461-462 (1971). There can be a legitimate expectation of privacy in the interior of a motor vehicle, however diminished. Such an expectation clearly exists in those areas which would be otherwise free from observation except by physical intrusion of some sort. See Commonwealth v. Ortiz, supra at 353. In the typical passenger vehicle, these places must include at least the trunk,

the glove compartment, closed containers in the interior, and in most cases, the area under the seats. An intrusion into these places is a search. See Commonwealth v. Almeida, 373 Mass. 266, 269-270, 272 (1977). Cf. Rakas v. Illinois, supra at 148-149.6/ With the vehicle in question, a windowless van, we think the protected area includes, in the curcumstances of this case, its rear interior portion as well. One reason frequently posited for the lesser expectation of privacy recognized in automobiles is the high visibility of their interiors. See Rakas v. Illinois, supra at 154, n.2 (Powell J., concurring). The van in the case at bar was apparently designed to minimize this visibility.7/ Moreover, we have ruled that a search

6/ In Rakas v. Illinois, supra at 148-149, the Court recognized, by negative implication, that there were circumstances where at least the owner of the vehicle could have a legitimate expectation of privacy in these areas.

7/ According to uncontradicted testimony, it had windows only by the driver and passenger seats, plus the windshield. None of these would appear to offer a ready view of the rear interior from a vantage point on the street level. There is no finding that such a view might be possible.

occurred when police officers entered a regular automobile and seized drugs from within it. Commonwealth v. Ortiz, supra at 353.8/ Thus, we conclude that Officer Brown's entry into the van, and subsequent seizure of the contraband, constituted a search and seizure within the scope of the Fourth Amendment.

As we indicated earlier, the Commonwealth contends that the intrusion was a "lawful threshold inquiry," thus apparently conceding that it was not supported by full probable cause.9/ The officer's conduct here was so markedly different from that typically seen in "threshold inquiry" cases that

8/ In Commonwealth v. Ortiz, supra, we utilized the expectation-of-privacy analysis to distinguish between search and nonsearch situations. Id. at 351-353.

9/ We note further that Officer Brown testified that it was not until after he had seized the plastic bag that he formed a belief that it contained hashish. Cf. Sullivan v. District Court of Hampshire, Mass. Adv. Sh. (1981) 2370, 2377-2378.

we cannot credit this theory. Compare Commonwealth v. Ferrara, 376 Mass. 502, 505 (1978); Commonwealth v. Moynihan, 376 Mass. 468, 470-471 (1978); and Commonwealth v. Almeida, supra at 270-272, with Commonwealth v. Thibeau, Mass. Adv. Sh. (1981) 2401, 2402-2403; and Commonwealth v. Bacon, supra at 2226-2227. Prior to entering the van, the officer made no attempt to question or communicate with the defendants in any way, nor does the record disclose that he was warranted in taking reasonable precautions for his safety. Compare Commonwealth v. Loughlin, 385 Mass. 60, 62-63 & n.3 (1982). If anything, the officer was "'perform[ing] a threshold search,' in other words, a search." Commonwealth v. Wooden, 13 Mass. App. Ct. 417, 421 n.1 (1982). Since the search was not supported by full probable cause, and since it was not conducted according to the standards established for a threshold inquiry, it was unlawful. See Commonwealth v. Loughlin, supra at 64-65 (Hennessey, C.J., concurring). Accordingly, the evidence seized should be suppressed.

The Commonwealth challenges the "standing" of the defendant Podgurski, the passenger, to object to the search

of the vehicle.[10] The argument as to the defendant Podgurski is based on recent opinions of the United States Supreme Court which has established new principles governing standing for Federal constitutional purposes. See Rawlings v. Kentucky, 448 U.S. 98, 105-106 (1980); United States v. Salvucci, 448 U.S. 83, 95 (1980); Rakas v. Illinois, supra at 143.[11] Prior

[10] While contending that neither defendant had a reasonable expectation of privacy in the van, the Commonwealth does not challenge the "standing" of the defendant Collins, the owner of the van, to contest the search.

[11] In the wake of these opinions, and particularly in light of the uncertainty engendered by the abolition of the "automatic standing" rule of Jones v. United States, 362 U.S. 257 (1960), several State courts, in construing their own constutitonal provision against unreasonable searches and seizures, have opted to decide questions of standing by reference to their State Constitutions. State v. Settle, Nos. 81-007 & 81-009, slip op. at 4 (N.H. March 10, 1982). State v. Alston, 88

(footnote continued)

to these decisions, Podgurski would have been automatically entitled to "standing" whenever possession was an element of the offense charged. Jones v. United States, 362 U.S. 257 (1960). Relying particularly on Rakas v. Illinois, supra, the Commonwealth argues that Podgurski failed to show, under the expectation-of-privacy anaylsis, that his Fourth Amendment rights were violated. Reduced to its basic form, the distinction which the Commonwealth seeks to make between the two defendants turns solely on Podgurski's lack of an ownership or possessory interest in the van.

(footnote continued)

N.J. 211, 225-230 (1981). Cf. State v. Hernandez, 410 So.2d 1381, 1385 (La. 1982); State v. Barrett, 408 So.2d 903, 905 & n.2 (La. 1981); People v. Chernowas, 111 Mich. App. 1, 5 (1981). In so doing, these courts have expressed

(footnote continued)

The United States Supreme Court has emphatically rejected the notion that concepts of property law should determine one's ability to claim Fourth Amendment protection. See Rawlings v. Kentucky, supra at 105; United States v. Salvucci, supra at 91-92; Rakas v. Illinois, supra at 143, 149-150 n.17. Instead, ownership of the property

(footnote continued)

serious doubts that the changes wrought by the Court will have a salutary effect on either the administration of the criminal justice system or on the ability of their citizenry to claim protection against unreasonable searches and seizures. We have referred to the new standing approach of the United States Supreme Court in Sullivan v. District Court of Hampshire, supra at 2375-2376, and Commonwealth v. Simmons, Mass. Adv. Sh. (1981) 576, 584. Neither of those decisions required us to determine whether, as to a motor vehicle passenger charged with possession of contraband, we would adhere, under our State Constitution, to the portion of Jones giving automatic standing to such

(footnote continued)

searched is but one factor to consider in the expectation-of-privacy analysis. In the circumstances of this case it is a factor of minimal significance. We think that Rakas should not be read to deprive a "mere" passenger of standing to object to a search where, but for his lack of a propery interest in the vehicle, his situation is otherwise identical to that of the owner, who has the requisite standing. Accordingly, we

(footnote continued)

a defendant. Because the expectation-of-privacy analysis produces a just result in this case, we are not required here to decide whether to cast our lot with these other courts. We note, however, that art. 14 of the Declaration of Rights of the Massachusetts Constitution "may afford greater protections to a person in certain circumstances than those required by federal decisions interpreting the Fourth Amendment." Commonwealth v. Ortiz, 376 Mass. 349, 358 (1978).

affirm the order of the motion judge suppressing the evidence as to both defendants.

Order affirmed.

APPENDIX B

June 9, 1982

Chief Justice Edward F. Hennessey
Supreme Judicial Court
New Court House, Pemberton Square
Boston, MA 02108

Re: Commonwealth v. Podgurski & Collins
No. 2714, 386 Mass. 385 (1982)

Dear Chief Justice Hennessey:

The Commonwealth petitions for a rehearing because of three points which the court has misapprehended.

The first is a point of fact, the undisputed existence of two windows in the rear area of the van in question. These windows appear on the photographs that the Commonwealth and Collins provided to the court on June 2, 1982, as stipulated substitutes for Exhibits 9 and 10 which were discovered to be missing some time during the appeal. There is one fairly large window on the sliding door on the passenger's side of the van. This window runs almost the full width of the large sliding side door. The second window into the rear area of the van is on the tailgate door on the back of the van. The back door window appears to be slightly smaller than the side sliding door window.

Several times in its opinion the court described this as a windowless van, at least with respect to the rear

area. 386 Mass. at 386, 388, 389. The trial judge and all counsel at the trial knew from Exhibits 9 and 10 that there was a large window in the passenger side sliding door and in the rear tailgate door. The trial judge apparently believed that a finding on the windows would be superfluous since the windows were obvious in the defense-offered photographs, Exhibits 9 and 10, and since there was no dispute about the accuracy of these pictures (Hearing Transcript 103-104).

Unfortunately, when this court's opinion was written, Exhibits 9 and 10 were missing from the record, and counsel were unable to provide stipulated substitute exhibits until June 2, 1980. Footnote 7 of this court's opinion refers to uncontradicted testimony on the absence of windows behind the front seat. A reading of the transcript in the light of either Exhibits 9 and 10 or the stipulated substitute exhibits shows that this testimony refers only to the absence of windows behind the front seat on the driver's side (Hearing Transcript 92, 16).

The factual misapprehension about the absence of windows in the rear area of the van formed an essential part of the court's basis for its conclusion that the defendants had a reasonable expectation of privacy in the rear of the van. Thus the court's opinion, 386 Mass. at 389 states: "Such an expectation clearly exists in those

areas which would be otherwise free from observation except by physical intrusion of some sort . . . . With the vehicle in question, a windowless van, we think the protected area includes, in the circumstances of this case, its rear interior portion as well." The court's opinion emphasizes that in contrast with the high visibility of an automobile's interior, this van "was apparently designed to minimize this visibility" 386 Mass. at 398. Footnote 7 on the same page stresses the absence of "a ready view of the rear interior from a vantage point on the street level." The Commonwealth respectfully contends that because of the large windows in the rear area of this van, this area was not "otherwise free from observation." The defendants therefore could not have had an objectively reasonable expectation of privacy, particularly in the afternoon of a business day in a retail parking lot in a town center.

The second point of fact or law that we believe the court misapprehended is the court's conclusion (386 Mass. at 386 and n. 2) that the use of the phrase "suspicious activity" in the trial judge's findings means that the judge disbelieved the testimony by both the store manager and the police dispatcher that additional particular facts were reported to the dispatcher. When Paul Wiffen, the store manager, was asked to specifically state exactly what he told the dispatcher, he gave the following answers:

Q. . . . You said, Hi, identified yourself. Said there is something suspicious going on out back behind Richard Lewis. I work here. And will you send somebody up? Is that what you said?

A. Yes, sir.

Q Did you say anything else?

A No. Just basically about the cutting that I saw.

THE COURT. Just basically about the cutting. Did you say anything else, the lawyer asked you. What did you say? You said something about the cutting?

THE WITNESS. I said there was suspicious activity going on. It appeared there was somebody cutting up drugs in the back.

Q. Cutting up what?

A. Drugs. What I though to be drugs.

Q. Is that what you told the officer?

A. That is what I told him, sir.

Q. Do you know who you talked to?

A. I believe it was Officer Esterbrook [T. 21-22].

* * * *

Q. You just told the desk man about suspicious activity?

A. Yes, sir.

THE COURT. Is it fair statement to say, when you made that call--correct me--don't hesitate to correct me--that you said that you saw two men in a van, apparently cutting up what I thought to be drugs? Is that what you told the police officer, on the phone? Is that a fair--

THE WITNESS. I don't think I used the word, "drugs," at the time, Your Honor. But I did say they were cutting up a suspicious looking item.

MR. BUTLER. Your Honor, I would respectfully ask this witness's entire testimony be stricken as being unresponsive and incompetent.

THE COURT. That objection is overruled.

MR. BUTLER. Thank you, Your Honor.

THE COURT: What did you say? You saw the men in a van--don't let me put words in your mouth. It's very important, because I must find certain facts here, and while we have gone all over the lot on the examination, and questions, here, this is precisely what I am interested in. What do you now recollect, as best as you can, what you told the police officer is? Just go slow and think about your answer. What did you say?

THE WITNESS. All right, Your Honor. I called the station and told them who I was, calling from Richard Lewis, and that I observed a van in the rear parking lot, two individuals inside it, and it was my opinion that they were cutting some suspicous looking substance. I did not want to say at that time, for sure whether it was drugs or not; but I believed it to be.

THE COURT. So that is what you said?

THE WITNESS. Basically, Your Honor, I believe it is.

THE COURT. That is your best memory?

THE WITNESS. Yes. [T. 63-64].

The dispatcher, Officer Robert Esterbrook, testified on this point as follows:

Q. Is that exactly what Mr. Whiffen told you; what you wrote in the Journal?

A. No, it isn't.

Q. Could you tell the Court what Mr. Wiffen told you exactly?

A. He called and he stated to me, he said there were two men out in back of the store, in a blue van, and they were cutting up something they shouldn't have been cutting.

Q. And you wrote this notation in the Journal, sir?

A. Yes, sir.

Q. Would you please read to the Court what you wrote.

A. "Richard Lewis, Washington Street, called to report two men behind the store acting sucpicious. Sent square portable Officer Brown to check."

Q. Your testimony is, sir, that Mr. Wiffen said two men cutting up something they are not supposed to be cutting?

A. That is correct. [T. 73-74].

* * * *

Q. Did--would you tell the Court exactly, as you best remember, the exact words that Mr. Whiffen used?

A. When he called, he said he was the manger of--

Q. Would you speak louder?

A. When he called, he said he was the manager of Richard Lewis. He said there were two men out in the back, in a blue van, cutting up something they shouldn't have been cutting up.

Q. That is all he said?

A. Yes.

Q. Did he tell you what it was they were cutting up?

A. No, he didn't.

Q. Did he tell you what it looked like?

A. No, he didn't.

Q. But he did say it was a blue van?

A. Yes.

Q. Did he identify either of the men to you over the phone?

A. No, he didn't.

Q. Did he use the word, "suspicious" over the phone?

A. No. [T. 74-75].

The store manager and the dispatcher were the only witnesses to testify on the content of the case. The Commonwealth contends that when the trial judge characterized their testimony as a report of "'suspicious activity,'" the use of this shorthand phrase was not a finding that he disbelieved the testimony of both witnesses as to the details provided by the store manager.

Alternatively, if this is interpreted as a finding that the manager said nothing to the dispatcher other than "suspicous activity," the Commonweath contends that such a finding was clearly erroneous as a matter of law and not warranted by the evidence.

The Commonwealth's third point concerns the statement in the court's opinion that "[p]rior to entering the van, the officer made no attempt to question or communicate with the defendants in any way ...." 386 Mass. at 390. When Officer Brown approached the van he saw through the door from ten feet away that there were two men in the rear of the van. 386 Mass. at 836. Even if the store manager's call mentioned nothing more than suspicious activity, the officer could at the very least ask the van occupants some preliminary questions under the authority of G.L. c. 41, §98, and the threshold inquiry cases cited in the court's opinion. But how else would a reasonable officer "attempt to question or commuicate" with the two van occupants except by leaning his head through the open door and addressing them? This part of the court's opinion imposes a completely artificial and unreasonable restriction on a police officer's ability to ask a few preliminary questions in suspicious circumstances. Such a restriction is inconsistent with the Fourth Amendment and the threshold inquiry cases previously decided by this court.

For these three reasons, the Commonweatlh respectfully petitions for a rehearing.

Very truly yours,

Charles J. Hely
Assistant District Attorney

cc: Richard C. Driscoll, Attorney for Mr. Collins

Edward G. Butler, Attorney for Mr. Podgurski

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
AT BOSTON

June 24, 1982

ORDER

In the case no. SJC-2714

COMMONWEATLH
vs.
RONALD PODGURSKI
(and three companion cases)

pending in the Superior Court Department of the Trial Court for the County of Norfolk, Nos. 76616, 76617, 76618 and 76619, It Is Hereby Ordered, as follows:

The Commonweath has petitioned for rehearing in the case of Commonwealth v. Podgurski, 386 Mass. 385 (1982). Of the three points presented, only one has import. After our opinion was released, the Commonwealth presented us with a set of photographs of the van in question, which the parties stipulated were substitutes for exhibits admitted at the suppression hearing. These photographs show the existence of two windows, one on the passenger side sliding door and the other on the rear door. The windows shown are in addition to those to which the opinion of the court refers, based

on a reading of the transcript of the hearing on the motion to suppress. Id. at 386 n.3, 389 n.7. The pictorial exhibits were not transmitted to the court. Approximately one month prior to the release of the opinion we had requested these exhibits from the office of the Clerk of the Superior Court, which in turn requested these exhibits from the office of the District Attorney. When these were not forthcoming, the opinion issued, based on the record which had been provided to us. The existence of the two additional windows is not suggested by a reading of the transcript, and the Commonwealth should not now be heard to complain of factual inadequacies which it had ample opportunity to prevent.

We note that, even were we to reconsider the case in light of the two windows, our decision would remain unchanged. First, the trial judge, who had the benefit of the photographs, nevertheless found a legitimate expectation of privacy in the circumstances of this case. Second, our reference in the opinion to Commonwealth v. Ortiz, 376 Mass. 349, 353 (1978), indicates that, under the expectation-of-privacy analysis, the entry into the van constituted a search within the scope of the Fourth Amendment. See Commonealth v. Podgurski, supra at 389 & n.8.

The petition for rehearing is, accordingly, denied.

By the Court,

_____ Clerk

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. SUPERIOR COURT
CRIMINAL NOS
76618, 76619

COMMONWEALTH	)	
	)	AMENDED FINDINGS,
V.	)	RULINGS AND ORDER
	)	ON DEFENDANTS'
EDWRD J. COLLING III	)	MOTION TO
and	)	SUPPRESS
RONALD PODGURSKI	)	

* * * * * * * * * * * * * * *

This case initially came before me on defendants' motion to suppress certain drugs and paraphernalia seized by the police during a warrantless search of a motor vehicle. This court allowed the motion to suppress, and filed its Findings, Rulings and Order outlining the rationale for that determination. The Commonwealth now brings a Motion for Reconsideration of the Findings, Rulings and Order,

contesting the inadequacy of certain findings of fact and more particularly a misstatment of law relating to the burden of proof relative to the issue of standing of the defendant Podgurski. No question is presently raised as to the issue of standing of the defendant Collins. This court held a hearing on that motion, and after considering the arguments presented, the court vacated its Findings of Fact and Rulings previously filed and in lieu thereof files this Amended Findings, Rulings and Order.

1. On September 22, 1980, at approximately 3:45 p.m., the Canton Police Department received a telephone call from one Paul Wiffen, the manager of Lewis' Clothing Store in Canton,

informing them of certain "suspicious activity" in a blue van parked in the rear parking lot of the store.

2. In response to the telephone call, the Canton Police Department informed Patrolman James A. Brown that two men were acting suspiciously in a van at the stated location, and dispatched Officer Brown to the scene.

3. Officer Brown approached the blue van, first observed by him at a distance of approximately forty (40) feet. He then proceeded towards the van until he was approximately ten (10) feet away at which time he noticed two people in the rear of the van.

4. Officer Brown observed that the sliding door on the passenger side of the van stood approximately fifteen (15) to eighteen (18) inches ajar, but he saw

no contraband or criminal activity from that vantage point.

5. Officer Brown then inserted his head into the van through the space made by the open door. At this time, Officer Brown observed a large knife in the hands of Podgurski, along with other items in the area, including a small clear plastic sandwich bag containing a brown substance, which bag he removed from the van.

6. A second officer, Earl Newhause, appeared on the scene in a police cruiser, and the two officers requested that the two occupants step out of the van, at which point said officer went into the interior of the van and seized other drugs and paraphernalia.

7. I find that at the time Officer Brown put his hand on the van and pushed his head inside the interior of the van, the officers were not aware of any crime having been committed or being committed, nor did they have probable cause to believe that there was contraband in the van.

8. The court also finds and rules that the police cannot justify the seizure on the doctrine of "plain view" as that legal doctrine is recognized and applied.

9. No issue of consent is raised here.

Rulings of Law

1. The intrusion of a police officer's head into the van occupied by

the defendants constituted an illegal search and seizure within the meaning of the Fourth Amendment to the United States Constitution and Article Fourteen of the Massachusetts Constitution.

2. Although searches of automobiles are generally afforded a lesser degree of Fourth Amendment protection than are private dwellings, Carroll v. United States, 26 F. U.S. 132 (1925), "the word 'automobile' is not a talisman before which the Fourth Amendment fades away and disappears", Coolidge v. New Hampshire, 403 U.S. 443, 461 (1971).

3. There was no probable cause to believe that contraband was located within the van until after the intrusion of the police officer's head. The mere assertion of "suspicious activity" by an

onlooker untrained in detecting illegal drug activity is unsufficient to form the basis for a finding of probable cause.

4. The warrantless search of the van occupied by the defendants does not fall within the plain-view doctrine since the items seized were not in plain view until after the intrusion of the police officer's head into the van. To fall within the plain-view exception, it must be established that the evidence incriminating to the accused was discovered inadvertently. Coolidge v. New Hampshire, supra at 466. Here the evidence was discovered by virtue of a search conducted without legal justification.

5. The search of the van was not incident to a lawful arrest, since there

was no arrest at the time of the intrusion.

6. Prior to the decision of the United States Supreme Court in Rakas v. Illinois, 439 U.S. 128 (1978), this court would have relied on Jones v. United States, 362 U.S. 257 (1960), to conclude that the defendant Podgurski[1/] had "automatic" standing to challenge the warrantless search because the possession, which is an essential element of the offense charged, establishes standing. The Supreme Court, however, has recently adopted the position that traditional

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1/ The Commonwealth challenges only the standing of Podgurski to assert a Fourth Amendment violation. There is no issue raised as to the ability of Collins to raise the Fourth Amendment claim.

issues of legal standing "are more properly subsumed under substantive Fourth Amendment doctrine", Rakas v. Illinois, supra, at 138-139, with the result that the concept of standing is to be set aside in favor of a "substantive Fourth Amendment test" of legitimate expectation of privacy from unreasonable governmental intrustion. Id. at 140.2/

2/ While the Rakas decision rejected the notion that a legitimate presence in an area searched conferred standing to object to a search of that area, see Rakas v. Illinois, supra, at 147-148, the Supreme Court in United States v. Salvucci, 100 S. Ct. 2547, 2553 (1980), eliminated the automatic standing rule of Jones v. United States, supra, as a means of establishing standing. Salvucci emphasizes that the appropriate inquiry is "not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched." 100 S. Ct. at 2553.

7. With regard to the burden of showing standing, it is clear that "[t]he proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure". Rakas v. Illinois, supra, at 130-131 n.1. The Supreme Court elaborated upon the nature of this burden in Rawlings v. Kentucky, 100 S. Ct. 2556 (1980). The Rawlings case involved a question whether Rawlings could challenge the legality of a search of a companion's purse, where the search resulted in the seizure of controlled substances belonging to Rawlings. In affirming a decision holding that Rawlings had not made a sufficient showing to indicate a violation of his

legitimate or reasonable expectations of privacy, the Court stated that "[Rawlings] bears the burden of proving not only that the search of [his companion's] purse was illegal, but also that he had a legitimate expectation of privacy in that purse". Id. at 2561 (citing Rakas v. Illinois, 439 U.S. at 131 n.1).

A literal reading of the quoted language from Rawlings seems to indicate that the courts must engage in a two-fold inquiry before deciding whether a party may object to a particular search. A review of the Rakas opinion, and one of the concurring opinions in Rawlings, however, strongly suggests a somewhat different approach. Concurring in the Rawlings decision, Justice

Blackmun wrote that "[i]t remains possible for a defendant to prove that his legitimate interest of privacy was invaded, and yet fail to prove that the police acted illegally in doing so. And it is equally possible for a defendant to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected." Rawlings v. Kentucky, supra, at 2565 (Blackmun, J., concurring).

Justice Blackmun's explication of the holding in Rawlings derives considerable support from the Rakas decision. The concurring and dissenting opinions in Rakas recognize that the Fourth Amendment was designed, in part, to protect the liberty and property interests of the person. The concurring

opinion in Rakas is careful to point out that "[t]he petitioners do not challenge the constitutionality of the police action in stopping the automobile in which they were riding; nor do they complain of being made to get out of the vehicle." Rakas v. Illinois, supra, at 150-151 (Powell, J. and Burger C.J., concurring).[3/] Hence, it is clear that Rakas did not deal with the question of standing to contest an

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3/ The dissenters in Rakas also identified the distinction: "Thus, petitioners of course have standing to challenge the legality of the stop, and the evidence found may be a fruit of that stop.... Nor have petitioners chosen to argue that they were 'arrested' in constitutional terms as soon as they were ordered from the vehicle and that the search was a fruit of that infringement on their personal rights." Rakas v. Illinois, supra, at 160 n.5 (White, Brennan, Marshall & Stevens, JJ, dissenting).

unconstitutional stop. See United States v. Williams, 589 F.2d 210, 214 (5th Cir. 1979); 3 W.R. LaFave, Search and Seizure §11.3, at 107-108, 117-119 (West Supp. 1981).

8. Turning to the instant case, this court has determined that the police officer lacked probable cause to extend his head into the interior of the van; hence that conduct constituted an unreasonable search. The question remains whether Podgurski was entitled to object to that illegal threshold intrusion. This court finds and rules, on two grounds, that Podgurski does have standing to object to the Fourth Amendment violation.

First, the court finds that Podgurski had a legitimate expectation

of privacy in the materials seized inside the van; hence he has satisfied his burden of proof as articulated in the Rawlings decision. Second, even if it were determined that Podgurski had no expectation of privacy with respect to the items seized inside the van, he still possesses the requisite standing to object to the illgal threshold intrusion by the police officers.4/

4/ Professor Wayne LaFave provides a useful hypothetical, applicable to the present case, which serves to clarify this determination:

> "If the police, without required notice or without probable cause or without a required search warrant, burst into B's home and disrupt a dinner party at which A is present as a guest, then certainly A

(footnote continued)

This alternative ground is supported by the factual circumstances of this case, contemplated by Justice Blacmun, which enable Podgurski "to prove that the police acted illegally, and yet fail to prove that his own privacy interest was affected." Rawlings v. Kentucky, supra, at 2565 (Blackmun, J., concurring).

(footnote continued)

> should be deemed to have standing to object--just as passengers in a car may object to its illegal stopping. Dinner guest A has had his freedon, privacy and solitude intruded upon by the police, and thus he has standing to object to that encroachment upon his rights, even if it led to the discovery of evidence in B's basement, a place A (in Justice Rehnquist's language) 'has never seen, or been permitted to visit.'"

3 W.R. LaFave, supra, §11.3 at 108 (West Supp. 1981) (emphasis supplied).

Podgurski properly challenged the legality of the initial search of the parked van.

The Motion to Suppress is ALLOWED.

Thomas E. Dwyer
Justice of the Superior Court

Dated: April 14, 1981

APPENDIX E

Rules of Criminal Procedure

Rule 15

INTERLOCUTORY APPEAL

(Applicable to District Court and Superior Court)

(a) District Court.

(1) Right of Appeal Where Pretrial Motion to Dismiss Granted. The Commonwealth shall have the right to appeal to the Appeals Court a decision by a judge granting a motion to dismiss a complaint or indictment made pursuant to the provisions of subdivision (c) Rule 13.

(2) Right of Appeal Where Motion to Suppress Evidence Granted. The Commonwealth shall have the right to prosecute an interlocutory appeal to the Appeals Court of a decision by a judge granting a motion to suppress evidence. The trial of a case in which a motion to suppress is granted shall not commence prior to the expiration of the time within which the Commonwealth must claim its appeal.

(3) Procedural Requirements.

(A) Claim of Appeal. If the District Court has retained jurisdiction over the offense charged, an appeal of a pretrial matter pursuant to this subdicition

(a) shall be taken upon the ruling of the judge, or within such other time as the judge may allow, and in any event before the defndant has been placed in jeopardy under established rules of law. No appeal may be taken of matters arising out of a probable cause hearing.

(B) Approval. The approval of the district attorney or the attorney general must be obtained for an appeal under this subdivision (a). A signed authorization for the appeal must be filed with the court within three days after the decision of the judge or within such other time as the judge may allow.

(4) Record. When a stenographic transcript of the proceeding is available, it shall constitute a part of the record on appeal. If no such transcript is available, the parties shall reduce to writing a statement of the proceedings which shall be filed with the court. If found by the judge to be conformable to the truth, the statement shall constitute part of the record on appeal. The judge shall make, such findings of fact as are necessary to the appeal.

(b) Superior Court

(1) Right of Appeal Where Pretrial Motion to Dismiss or for Appropriate Relief Granted. The Commonwealth shall

have the right to appeal to the appropriate appellate court a decision by a judge granting a motion to dismiss a complaint or indictment or a motion for appropriate relief made pursuant to the provision of subdivision (c) of Rule 13.

(2) Right of Appeal Where Motion to Suppress Evidence Determined. A defendant or the Commonwealth shall have the right and opportunity to apply to a single justice of the Supreme Judicial Court for leave to appeal a decision, order, or judgment determining a motion to suppress evidence prior to trial. If the single justice determines that the administration of justice would be facilitated, he may grant that leave and may hear the appeal or may report it to the full Supreme Judicial Court or to the Appeals Court. The judge may allow such stay of the proceeings as is reasonable under the circumstances to enable the defendant to file an application for leafe to appeal. The trial of a case in which a motion tc suppress evidence is granted shall not commence prior to the expiration of the time allowed to the Commonwealth to file an application for leave to appeal.

(3) Procedural Requirements. An appeal under subdivision (b)(1) shall be taken and an application for leave to appeal under subdivision (b)(2) shall be filed within such reasonable time after the ruling of the judge as the judge may

allow in any event before the defendant has been placed in jeopardy under established rules of law.

(c) Determination of Motions. Any motion the determination of which may be appealed pursuant to this rule shall be decided by the judge before the defendant is placed in jeopardy under established rules of law.

(d) Costs upon Appeal. If an appeal or application therefor is taken by the Commonwealth, the appellate court, upon the written motion of the defendant supported by affidavit, shall determine an approve the payment to the defendant os his costs of appeal together with reasonable attorney's fees, to be paid on the order of the trial court upon the entry of the rescript.

(e) Stay of the Proceeings. If an appeal is taken or an application for leave to appeal is granted, the trial shall be stayed pending the entry of a rescript from or an order of the appellate court., If an appeal or application therefor is taken by the Commonwealth, the defendant may be released on personal recognizance during the pendency of the appeal.